IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES LITIGATION	§	Civil Action No. H-01-3624 **(Consolidated)**
	§	CLASS ACTION
This Document Relates To:	§	
MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated,	§	
Plaintiffs,	§	
vs.	§	
ENRON CORP., et al.,	§	
Defendants.	§	
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Individually and On Behalf of All Others Similarly Situated,	§	
Plaintiffs,	§	
vs.	§	
KENNETH L. LAY, et al.,	§	
Defendants.	§	

LEAD PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

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I. INTRODUCTION

Pursuant to Federal Rules of Civil Procedure 23(a) and (b)(3), Lead Plaintiff, The Regents of the University of California ("The Regents"), seeks an order certifying a plaintiff class of (i) all persons who purchased the publicly traded equity and debt securities of Enron Corporation ("Enron" or the "Company") between October 19, 1998 and November 27, 2001 (the "Class Period"), and (ii) all states or political subdivisions thereof or state pension plans that purchased from defendants Enron's 6.40% Notes due 7/15/06 or 6.95% Notes due 7/15/28, and that authorize the prosecution of their claim pursuant to the Texas Securities Act (collectively, the "Class").[1] The Regents also seeks the appointment of designated representatives for various securities purchasers within the Class.

For purposes of a class-certification motion, the substantive allegations contained in the complaint must be accepted as true.[2] Moreover, "Rule 23 is a ***remedial rule*** [and courts] should ... construe[] [it] liberally to permit class actions, especially in the context of securities ... suits, where the class action device can prove effective in ***deterring illegal activity***." *Longden*, 123 F.R.D. at 551.[3] In light of these fundamental precepts, courts have found the class-action mechanism to be most suited for dealing with extensive and complicated litigation alleging extensive financial fraud pursuant to federal or state laws. *See infra* §IV.B.2.

This case exemplifies what Rule 23 envisions for class treatment. Indeed, the complexity of this case – purchasers of various securities – is similar to the *American Continental Corp./Lincoln Savings & Loan ("ACC/Lincoln")* class litigation, which followed (like here) one of the nation's largest financial frauds. That class action proceeded efficiently and effectively with a single class

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[1]The Class includes purchasers of Enron's debt and equity securities as well as states or political subdivisions thereof or state pension plans that, under §16 of the Securities Act of 1933 and §28 of the Securities Exchange Act of 1934, may "opt" to bring the Texas Securities Act claims alleged at ¶¶1017-1030 of the Consolidated Complaint filed in this action April 8, 2002. This motion proposes Washington State Investment Board be designated as representative for the Texas Securities Act claims. *See infra* §III.D.2.b.(2).

[2]*Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974) (the question of whether a complaint has merit is independent of whether a class should be certified under Rule 23); *see also Longden v. Sunderman*, 123 F.R.D. 547, 551 (N.D. Tex. 1988).

[3]Unless stated otherwise, all emphasis is added and citations omitted.

of investors represented by a sampling of claimants seeking redress from a varied and large number of defendants (the class was defined as "all persons who purchased any and all types of securities of American Continental Corporation").[4] The class in *ACC/Lincoln*, which included members ranging from institutions to employees of the defendant corporation, was represented by plaintiffs who purchased different securities and pursued various remedies under federal and state laws, and the district court certified a class as the superior method to adjudicate that complex litigation.[5] Likewise, one class, represented by Lead Plaintiff and a sampling of designated class representatives, is the superior method to adjudicate this litigation.

In sum, this motion satisfies the prerequisites for class certification: Lead Plaintiff and the proposed representatives are willing and able to protect the interests of the Class and will zealously participate in the prosecution of the case, common issues predominate, and the class-action mechanism is superior to any other means of proceeding with this complex litigation.

II. FACTUAL OVERVIEW

A. Year-End 97 Crisis

The alleged fraudulent scheme can be traced, at a minimum, to the end of 97. At that time, Enron learned that Joint Energy Development Incorporated ("JEDI") limited partnership had to be restructured, as the outside investor who established JEDI with Enron would withdraw by year end. This created a crisis. If another outside investor for JEDI could not be found, then JEDI would cease to be an independent entity and its financials would have to be consolidated with Enron's. Thus, Enron would have to wipe out all of the profitable transactions it had done with JEDI in 97 – *i.e.,* put JEDI's $700 million debt on Enron's balance sheet – and lose the ability to generate profits from similar such deals with JEDI's successor going forward. Consolidated Complaint, ¶9.[6]

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[4] *In re American Continental Corp./Lincoln Savings & Loan Sec. Litig. ("ACC/Lincoln")*, 49 F.3d 541, 542 (9th Cir. 1995).

[5] *In re American Continental Corp./Lincoln Savings & Loan Sec. Litig. ("ACC/Lincoln")*, 140 F.R.D. 425, 431 (D. Ariz. 1992).

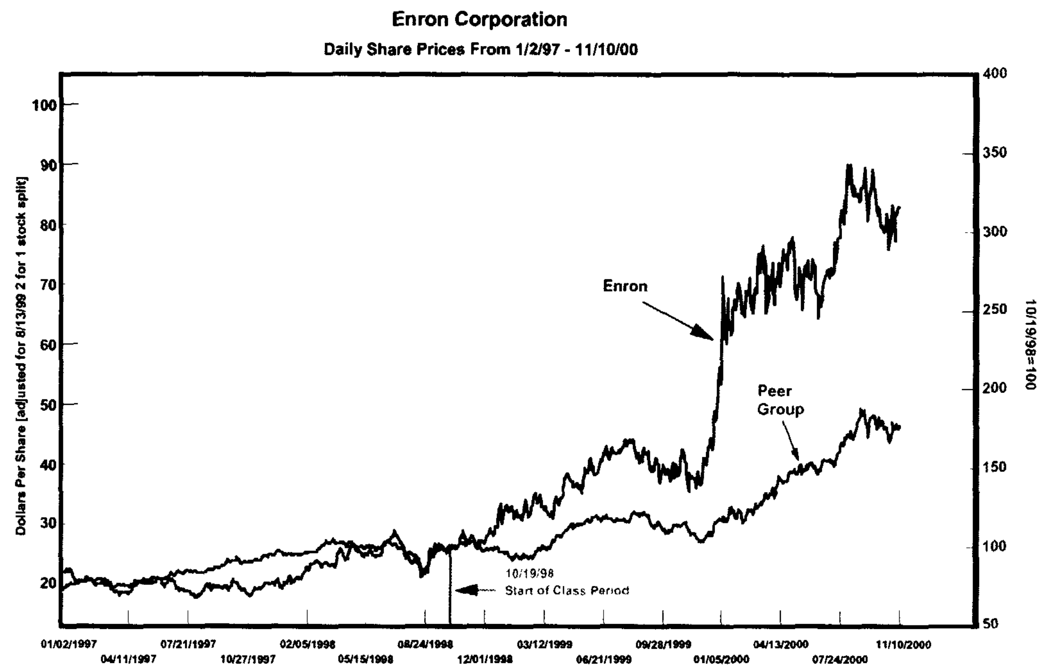
[6] All paragraph references ("¶_") are to the Consolidated Complaint.

Enron could not find a legitimate buyer for the outside investor's interest in JEDI. Instead, Enron quickly formed Chewco, which Enron and an Enron executive – Michael J. Kopper – controlled, to buy the outside investor's interest in JEDI. Chewco did not have an outside equity investor which was an independent third party, as was required to comply with accounting rules. So, Barclays Bank loaned $240 million to Chewco, requiring a secret guarantee from Enron. Barclays also loaned money to two straw parties to provide for their purported equity investment in Chewco. Because Barclays knew that the so-called equity investors in Chewco were, in fact, Enron strawmen, the bank required Chewco to support the purported equity loans Barclays made to the two strawmen via a $6.6 million reserve paid to Barclays. Thus, there was no independent outside investor in Chewco and its financials should have been consolidated with Enron's. ¶10.

The year-end 97 Chewco deal avoided a disaster for Enron and was exemplary of the deceit to come. Between 98 and 01, Enron and its bankers would create numerous other secretly controlled partnerships and entities and use them to generate hundreds of millions of dollars of phony profits while concealing billions of dollars of Enron debt. ¶11.

B. Enron's Stock Soars

As Enron reported better-than-expected year-end 97 financial results, its stock moved higher. Throughout 98, 99 and 2000, as Enron reported record profits and a strong financial position, defendants made extremely positive, but false, statements to the Company's investors. Defendants extolled the success and earning power of Enron's Wholesale Energy trading business ("WEOS"), its Retail Energy Services business ("EES"), and its Broadband Content Delivery and Access Trading business ("EBS"). ¶¶2, 14. As a result, its stock was a very strong performer and its debt securities also traded at high prices. ¶15. Enron's apparent success gave the Company and its bankers ready access to the capital markets, by which defendants raised billions of dollars by selling newly issued Enron securities to public investors, using the proceeds to repay Enron's bank debt. ¶16. The Company's stock price soared during this time, reaching its all-time high of $90-3/4 in 8/00, and it traded at or near these levels for months, as shown below (¶15):



By 97-98, Enron was reporting hundreds of millions of dollars of phony profits, while concealing billions of dollars of debt – inflating its shareholder equity by billions of dollars and disguising its true creditworthiness to its debt purchasers. Reported profits were being generated by phony, non-arm's-length transactions and improper accounting tricks – including the abuse of mark-to-market accounting. In fact, in mid-8/01, an Enron executive – a former Andersen accountant – wrote Lay, telling him the Company was "***nothing but an elaborate accounting hoax***." Further, in referring to the special-purpose entity – SPE transactions – which Enron's banks and lawyers had structured, she noted that nothing "***will protect Enron if these transactions are ever disclosed in the bright light of day***," and warned, "***[W]e're such a crooked company***." ¶51.

To make matters worse, Enron had capitalized many of its partnerships and SPEs, including those in which numerous defendants had invested, with shares of Enron stock, and had agreed to issue millions of additional shares of its stock to these entities if the Company's stock price declined below certain trigger prices. Further, Enron would become liable for the debt of those entities if it lost its investment-grade credit rating. Because of the price triggers and the way Enron capitalized these entities, it was vital to defendants that the Company's stock continue to trade at high levels and that it maintain its investment-grade credit rating, otherwise the scheme would unravel. ¶¶18-20.

Enron's investment-grade credit rating and high stock price were vital to its access to the capital markets, by which it raised billions of dollars in capital to repay its commercial-paper debt and short-term loans (investments made by Enron's banks.). Thus, the alleged scheme was aimed at defrauding the purchasers of Enron's debt and equity securities. ¶20.

C. The Partnerships and SPEs

To falsify Enron's reported financial results, Enron and its banks engaged in a series of purported partnership and related-party transactions with entities known as SPEs. A public company that conducts business with an SPE may treat that entity as if it were independent ***only*** if it does not control the SPE and the SPE is sufficiently independently capitalized. During 99, with the expertise and endorsement of defendants Vinson & Elkins and Kirkland & Ellis, Enron's bankers created, structured, and financed illicit partnerships and bogus SPEs secretly controlled by Enron. The Company then engaged in numerous non-arm's-length transactions with the LJM partnerships – controlled by CFO Fastow and his lieutenants – and associated SPEs, which inflated reported profits by more than a billion dollars. The partnerships not only artificially inflated Enron's earnings, thus deceiving investors, but they enabled several Company employees and all of its banks or bankers named as defendants to loot the Company of hundreds of millions of dollars. ¶¶23-24, 29, 646-647.

LJM2, used to create the infamous Raptors vehicles (¶24), was a partnership consisting of Enron's bankers and several Company employees. The LJM2 partnership offering memorandum, by which Enron and Merrill Lynch brought investors into the partnership – ***which was not a public document*** – contained an invitation to benefit from the self-dealing transactions that LJM2 would engage in. It stressed the "***unusually attractive investment opportunity***" resulting from LJM2's connection to Enron. It emphasized Fastow's position as Enron's CFO, and that LJM2's day-to-day activities would be managed by him, and other Enron insiders. It explained that "[t]he Partnership expects that Enron will be the Partnership's primary source of investment opportunities," and that it "expects to benefit from having the opportunity to invest some $150 million in Enron-generated investment opportunities that would not be available otherwise to outside investors." It specifically noted that Fastow's "access to Enron's information pertaining to potential investments will contribute to superior returns." Investors were told that investors in JEDI, a similar Fastow-controlled partnership, which had done deals with Enron like the ones LJM2 would do, had tripled their investment in just two years and that overall returns of 2,500% to LJM2 investors were actually anticipated. ¶25. In fact, Fastow's dual role, by which he could self-deal on behalf of the LJM2 partnership with Enron's assets, was so important ***that investors in LJM2 were assured that they did not have to make any additional capital contributions if Fastow's dual role ended.*** ¶24. In short, the non-public offering memorandum was an invitation to share in the benefits of non-arm's-length self-dealing transactions – the looting of Enron – and its bankers and the top executives of those banks were permitted to invest in LJM2, as a reward to them for their ongoing participation in the scheme to defraud the Company's investors. ¶25. And while Enron's publicly filed reports disclosed the existence of the LJM partnerships, these disclosures did not reveal the essence of the transactions completely or clearly, and failed to convey the substance of what was going on between Enron and the partnerships. The disclosures also did not fully disclose the nature or extent of Fastow's financial interest in the LJM partnerships. This was the result of an effort to avoid disclosing his financial interest and to downplay the significance of the related-party transactions and to disguise their substance and import. The disclosures also represented that the related-party transactions were reasonable compared to transactions with third parties when, in fact, they were not. ¶67.

LJM2 was funded at year-end 99 to serve as a vehicle to do four critical deals with Enron, allowing it to falsely, but with an alibi in place, exceed its forecasted earnings. As had been the case with Chewco at year-end 97, there was tremendous time pressure to quickly form the partnership before year-end. So, in an extraordinary step, on 12/12/99, top executives in Merrill Lynch, *via* MLJDX Positions, Inc., advanced $750,000 to pre-fund LJM2. ¶26. Merrill Lynch executives put up the money to pre-fund LJM2 so Enron could do the 99 year-end deals and avoid reporting a very bad 4thQ 99 – which would have caused its stock price to plunge. These vital year-end 99 deals included:

1. ***Collateralized Loan Obligations ("CLOs"). On 12/22/99***, Enron pooled purchaser CLO rights and sold the lowest-rated tranche to Whitewing LLP (an Enron affiliate) and LJM2. Whitewing loaned LJM2 the money to purchase its interest in the

CLOs. Enron secretly guaranteed Whitewing's investment and loan to LJM2. Through this transaction Enron falsely recorded the sale of millions of dollars in the 4thQ 99 to an entity that should have been consolidated.

2. ***Nowa Sarzyna (Poland Power Plant). On 12/21/99***, Enron sold LJM2 a 75% interest in the Nowa Sarzyna power plant. Enron had tried to sell this interest by year end to an independent buyer, but could not find an independent buyer in time, so it used LJM2, which paid $30 million. This sham transaction fraudulently moved millions of dollars of debt off Enron's balance sheet. The debt financing required Enron to maintain ownership of at least 47.5% of the equity until the project was completed. But the lender ***granted a waiver*** of this until 3/31/00, at which time Enron and Whitewing reacquired LJM2's equity interest and repaid that loan.

3. ***MEGS, LLC. On 12/29/99***, Enron sold LJM2 a 90% equity interest in MEGS, a natural-gas system in the Gulf of Mexico. Through this transaction Enron fraudulently avoided consolidating the asset at year-end 99, avoiding millions of dollars of debt on its balance sheet. The Company repurchased LJM2's interest in MEGS in early 00.

4. ***Yosemite. On 12/29/99***, Enron purportedly sold certificates in Yosemite to LJM2, but this transaction, which did not occur until 2/28/00, was made to appear to occur at year-end 99 to reduce Enron's interest in Yosemite from 50% to 10% so the Company would not have to disclose its ownership of these certificates in its 99 financial statements. On 12/29/99, Condor, which was an affiliate of Whitewing and controlled by Enron, loaned the $35 million to LJM2 to buy the certificates. On 12/30/99, LJM2 transferred the certificates back to Enron through Condor, satisfying the one-day loan. ¶28.

Defendants also used the LJM partnerships to improperly recognize gains in Enron's investments – even though the Company remained at risk if those investments declined. One hedging transaction with LJM in 6/99 involved Rhythms NetConnections ("Rhythms") stock owned by Enron. Other hedging transactions occurred in 00 and 01 and involved SPEs known as the Raptor vehicles. These transactions were not economic hedges. They were deceptive devices devised to circumvent accounting rules. The economic reality was that Enron never escaped the risk of loss.

because it had provided the bulk of the capital with which the SPEs would pay Enron. In 99, the Company recognized income of over $100 million from the Rhythms purported hedging transaction. In the last two quarters of 00, Enron recognized pre-tax earnings of $530 million on several transactions with the Raptor entities. ¶33. Of course, hedging Enron's investments with the value of its own stock was extremely risky and created an enormous and unusual motive for the participants in the scheme to keep Enron stock trading at inflated price levels. ¶34.

As year-end 00 approached, two of Enron's Raptor SPEs were in danger of coming unwound as they lacked sufficient credit capacity to support their obligations, putting the Company at risk of having to take a multi-million-dollar charge against earnings. This would result in Enron's stock price plunging, more and more of the stock-issuance triggers would be hit, and a vicious fatal down-cycle would kick in. Therefore, defendants restructured and capitalized the Raptor SPEs at year-end 00 by transferring to them rights to receive even more shares of Enron stock. This artifice enabled Enron to avoid recording a huge credit reserve for the year ending 12/31/00, but defendants were now under ever-increasing pressure to support Enron's stock price and maintain its credit rating. ¶35. At the same time, investors in LJM2 benefitted from a series of extraordinary pay-outs from the partnership, including the Raptor SPEs. These payments, as defendant Skilling told investigators upon being shown documentation provided to all of LJM2's investors, was ***only*** possible because of Fastow's duplicity.[7] Thus, the bankers who were partners in LJM2 acted to further the Enron scheme and were economic beneficiaries of it. ¶31.

D. Hidden and Disguised Loans

Another tactic used by Enron and its banks to falsify its financial condition and hide debt involved deceptive transactions with J.P. Morgan Chase, CitiGroup, and CS First Boston. J.P. Morgan Chase used an entity it controlled known as "Mahonia," located in the Channel Islands off England. J.P. Morgan Chase and Enron utilized a scheme by which large bank loans were disguised as commodity trades. In fact, offsetting trades were arranged with the ultimate cost differential being in favor of the bank, representing the interest rate on the disguised loan. J.P. Morgan Chase and

[7] *New York Times,* "Enron Ex-Chief Said to Voice Suspicion of Fraud," 4/24/02.

Enron concealed some $4 billion in debt through this deceptive device and scheme. ¶44. Knowing the Company's true financial condition was precarious, J.P. Morgan Chase attempted to insure against default on those disguised loans by buying performance bonds from several insurance companies. But the insurers have refused to pay, alleging that, in fact, the commodity trades were bogus and fraudulently concealed the real nature of the transactions. And a federal district court judge has ruled that there is significant evidence to support the insurers' claims of fraud and deception and that these transactions were, in fact, disguised loans. ¶44.

CitiGroup and CS First Boston engaged in similar subterfuges to disguise large loans to Enron. CitiGroup lent Enron $2.4 billion via pre-paid swaps – the so-called Delta transactions – conducted through CitiGroup's Cayman Islands subsidiary. ¶45. CitiGroup also took unusual steps to protect itself financially against loss from these loans and what they knew were not only dubious but highly dangerous transactions. CitiGroup undertook to lay off substantial portions of its economic risk by selling Enron-linked securities as notes, including the concealed Delta loans in a package of securities. ¶47. These swap transactions perfectly replicated loans and were, in fact, loans. But Enron never reported them as such on its balance sheet. CS First Boston also engaged in making disguised loans to Enron. It gave the Company $150 million to be repaid over two years, with payments to vary with the price of oil. The transaction was made to appear to be a swap, but was, in fact, a loan – a reality admitted by the bank: "It was like a floating-rate loan," said Pen Pendleton, a CS First Boston spokesman. "We booked the transaction as a loan." But Enron did not show the loans on its balance sheet. ¶45.

By so doing, J.P. Morgan Chase, CitiGroup and CS First Boston were able to secretly prop up Enron's deteriorating finances without disclosing that, in fact, the Company ***had borrowed between $4-$6 billion from those banks***. Also astonishing about the Mahonia and Delta transactions is the way J.P. Morgan Chase and CitiGroup were ***paid off*** to engage in this subterfuge. Based on its purported investment-grade credit rating, Enron could have borrowed money from banks at 3.75%-4.25%. Rather, in the phony Mahonia and Delta transactions, Enron paid J.P. Morgan Chase and CitiGroup at least 6.5%-7.0% for the disguised loans – a huge difference from the cost of a legitimate bank loan – which made these disguised loans hugely profitable for J.P. Morgan Chase and CitiGroup. In effect, the Company paid off its banks for participating in these bogus transactions. ¶46.

E. New Power

Another example of how Enron, Vinson & Elkins, Kirkland & Ellis, Andersen, and CIBC falsified Enron's reported results is the New Power transaction, including its IPO, by which Enron improperly recognized $370 million in profits in the 4thQ 00. In 00, Enron owned millions of shares of New Power stock – then a private company – and controlled New Power. Enron and its bankers – CS First Boston, CitiGroup, and CIBC – executed the New Power IPO – 27.6 million shares at $21 per share in 10/00. After the IPO, Enron continued to hold 13.6 million shares of New Power common stock and warrants to purchase 42 million more shares. With the participation of Vinson & Elkins, Kirkland & Ellis, Andersen, and CIBC, in a deal secretly structured before the IPO, Enron then recognized a profit on the gain in value on its shares by hedging that gain via yet another non-arm's-length transaction with the LJM2 entity and an SPE called Hawaii 125-0. CIBC, and several other of Enron's banks, made a so-called loan of $125 million to Hawaii 125-0, but received a total-return-swap guarantee that was supposed to protect CIBC and the other banks against ***any loss*** from Enron. During 01, New Power stock fell sharply and converted Enron's huge gain on its New Power equity holdings into a huge loss early in 01 – a loss of about $250 million – which defendants agreed to conceal and did so until 10/01 when Enron shocked the markets by revealing a $1 billion write-off and $1 billion reduction in shareholders' equity. ¶42.

F. Late 00/Early 01 Prop-Up

In late 00/early 01, Enron's financial results began to come under scrutiny from a few accounting sleuths and short-sellers. Defendants were under extreme pressure to halt the decline in the price of the stock. They knew that if that stock-price decline continued it would hit the price triggers – with disastrous results. ¶52. Thus, in late 3/01, to avoid a pre-tax charge against earnings of more than $500 million from a shortfall in the credit capacity of the Raptor SPEs, Enron and certain of its banks restructured the Raptor vehicles by transferring more than $800 million of contracts to receive Enron's own stock to them just before quarter-end. ¶53. While maintaining these massive debts off their books, in early 01 Enron continued to report record results and it and its bankers continued to make very positive statements. ¶54.

G. The Impending Collapse

By Summer 01, Enron's top insiders knew the charade was coming to an end. ¶55. On 8/14/01, Enron announced that Skilling – who had become Enron's CEO just months earlier – was resigning for "personal reasons." While this resignation fanned investors' concerns, Enron and its banks lied to investors, telling them that Skilling's resignation was ***only*** for personal reasons and ***did not*** raise "***any accounting or business issues of any kind***," that Enron's financial condition "***had never been stronger***," and its "***future had never been brighter***." They said there was "***nothing to disclose***," Enron's "***numbers look good***," there were "***no problems***" or "***accounting issues***." According to them, the Enron "***machine was in top shape and continues to roll on – Enron's the best of the best***." ¶57.

H. The End

By 8/01, executives were complaining to Enron's Board that the fraud was so widespread it was out of control, and they extensively detailed specific and material fraudulent activity. ¶59. Six weeks later, on 10/16/01, Enron shocked the markets with revelations of $1.0 billion in charges and a reduction of shareholders' equity by $1.2 billion. Within days, *The Wall Street Journal* began an exposé of the JEDI, Chewco and the LJM SPEs, the SEC announced an investigation of Enron, and Fastow resigned. In 11/01, Enron was forced to admit that Chewco had never satisfied the SPE accounting rules and – because JEDI's non-consolidation depended on Chewco's status – neither did JEDI, and Enron consolidated Chewco and JEDI retroactive to 97. This retroactive consolidation resulted in a massive reduction in Enron's reported net income and massive increase in its reported debt. Enron then revealed that it was restating its 97, 98, 99 and 00 financial results to eliminate $600 million in previously reported profits and approximately $1.2 billion in shareholders' equity as detailed below (¶61):

ENRON ACCOUNTING RESTATEMENTS				
	1997	1998	1999	2000
Recurring Net Income Amount of Overstatement	$ 96,000,000	$113,000,000	$250,000,000	$ 132,000,000
Debt Amount of Understatement	$711,000,000	$561,000,000	$685,000,000	$ 628,000,000
Shareholders' Equity Amount of Overstatement	$313,000,000	$448,000,000	$833,000,000	$1,208,000,000

Simply stated, these partnerships – Chewco, LJM1, LJM2 and others like them – were created by Enron, its banks, Andersen, Vinson & Elkins, and Kirkland & Ellis specifically to enter into transactions that the Company could not, or would not, do with unrelated commercial entities. The significant transactions were designed ***to create phony profits or to improperly offset losses***. These transactions allowed defendants to conceal Enron's true financial condition. ¶62. As huge as the 11/01 restatements of the 97-00 financial statements were, they just scratched the surface of the true extent of the prior falsification of Enron's financial statements, failing to eliminate additional hundreds of millions of dollars of phony profits. ¶63. In truth, the Company's businesses were failures – as was known to each of the defendants, but Enron continued to reveal additional facts about its true condition and by 11/28/01, its publicly traded debt had been downgraded to junk status. By 12/2/01, when the Company filed for bankruptcy – ***then the largest bankruptcy in history*** – its publicly traded securities had suffered massive price declines, which inflicted billions of dollars of losses on purchasers of those securities. ¶66.

III. THIS ACTION SHOULD BE CERTIFIED AS A CLASS ACTION PURSUANT TO RULE 23(A) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 23(a) of the Federal Rules of Civil Procedure lists the prerequisites for maintaining a class action:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses

of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

The proposed Class and its representatives satisfy each of these prerequisites.[8]

A. The Class Is So Numerous that Joinder of All Members Is Impracticable

The numerosity requirement is satisfied when a potential class is so numerous that joinder of all members is impracticable. *Watson v. Shell Oil Co.*, 979 F.2d 1014, 1022 (5th Cir. 1992). Because a reasonable estimate of the number of purported members satisfies the numerosity requirement, a precise numeration is not required for certification. *Henry v. Cash Today, Inc.*, 199 F.R.D. 566, 569 (S.D. Tex. 2000) (Harmon, J.). Moreover, in the Fifth Circuit, "the prerequisite expressed in Rule 23(a)(1) is generally assumed to have been met in class action suits involving nationally traded securities." *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1039 (5th Cir. 1981).

The Class consists of those who purchased Enron's publicly traded securities during the Class Period.[9] The exact number of Class members is presently unknown and can be ascertained only through discovery, which is presently stayed. Based on the Company's reported shares, notes outstanding, and trading volume during the Class Period, however, Lead Plaintiff estimates there are thousands of Class members nationwide. *See Rubenstein v. Collins*, 162 F.R.D. 534, 537 (S.D. Tex. 1995) ("number of class members could extend into the thousands"); *Greenwald v. Integrated Energy, Inc.*, 102 F.R.D. 65, 68 (S.D. Tex. 1984) (DeAnda, J.) ("Millions of ... shares were traded, presumably to a great many investors during the class period. Clearly joinder of all plaintiffs would

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[8]In ruling on a motion for class certification, the court should not delve into the merits of plaintiffs' claims or the defenses of the lawsuit. *Eisen*, 417 U.S. at 177-78; *Bertulli v. Indep. Ass'n of Cont'l Pilots*, 242 F.3d 290, 297 n.29 (5th Cir. 2001) ("We do not consider the merits of a case when reviewing class certification."); *In re Lease Oil Antitrust Litig.*, 186 F.R.D. 403, 419 (S.D. Tex. 1999) ("In evaluating a motion for class certification, however, the court does not have the authority to conduct a preliminary inquiry into the merits of the case, and hence the substantive allegations contained in the complaint are accepted as true.").

[9]According to Enron's Report on Form 10-K, filed with the SEC on April 2, 2001, its common stock, cumulative second preferred convertible stock, and 7% exchangeable notes due July 31, 2002, were all traded on (among other exchanges) the New York Stock Exchange. *See* Declaration of James I. Jaconette filed herewith ("Jaconette Decl."), Ex. 1. Enron Capital Trust I 8.30% Trust Preferred Securities and Enron Capital Trust II 8-1/8% Trust Preferred Securities also traded on the New York Stock Exchange.

be impractical."). Accordingly, the proposed Class is sufficiently numerous to make joinder of all members impracticable.

B. There Are Common Questions of Law or Fact

Under Rule 23(a)(2), questions of law or fact common to the Class must predominate over questions pertaining to individual members. As this Court has held, this "is not a high burden." *Henry*, 199 F.R.D. at 569. Commonality is satisfied "when there is at least one issue, the resolution of which will affect all or a significant number of the putative class members." *Lightbourn v. County of El Paso*, 118 F.3d 421, 426 (5th Cir. 1997). *Accord Forbush v. J.C. Penney Co.*, 994 F.2d 1101, 1106 (5th Cir. 1993). Additionally, Rule 23(a)(2) is written in the disjunctive, so common questions of either fact ***or*** law will suffice to meet the commonality requirement. *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 914 (9th Cir. 1964).

Questions of law and fact common to the Class predominate over any questions that may affect only individual members, including:

(a) whether defendants implemented the manipulative devices or engaged in the wrongful scheme alleged;

(b) whether defendants' statements omitted material facts necessary to make the statements made, in light of the circumstances under which they were made, not misleading;

(c) whether defendants misrepresented material facts;

(d) whether the Securities Exchange Act of 1934 or the Securities Act of 1933 was violated by defendants' acts as alleged[10];

(e) whether defendants knew or recklessly disregarded that the statements made by them were false and misleading;

(f) whether the prices of the publicly traded securities were artificially inflated; and

(g) the extent of damage sustained by Class members and the appropriate measure of damages. ¶991.

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[10]With respect to certain claims brought by states or state pension funds, the predominant legal issue concerns whether defendants violated the Texas Securities Act. *See* ¶¶1017-1030; *infra* §III.D.2.b.(2).

Plaintiffs' claims arise from the same set of facts and are based on common legal theories. Plaintiffs allege an overarching fraudulent scheme and course of business that acted to defraud all of the purchasers of Enron's publicly traded securities. "Rule 10b-5 liability is not restricted solely to isolated misrepresentations or omissions; it may also be predicated on a 'practice, or course of business which operates ... as a fraud....' Under that section class members may well be united in establishing liability for fraudulently creating an illusion of prosperity and false expectations." *Blackie v. Barrack*, 524 F.2d 891, 903 n.19 (9th Cir. 1975). "Courts faced with similar fact situations as the case at bar have held that where the complaint alleges a scheme or common course of misconduct against a large class of purchasers allegedly defrauded over a period of time by similar misrepresentations, class certification is appropriate, regardless of the existence of some differences in class members' positions." *Longden*, 123 F.R.D. at 553 (citing *Blackie*, 524 F.2d at 902).

As the court held in *ACC/Lincoln*:

> Plaintiffs' case is not predicated exclusively or even predominantly on Rule 10b-5(b). The central issue is whether Defendants orchestrated ... a far-reaching scheme to inflate the apparent worth and prospects of ACC/Lincoln, while simultaneously concealing its latent but material weaknesses. These allegations are consonant with [Rule] 10b-5(a) and (c).... [T]herefore "the vast majority of factual and legal issues will be common to the class."

140 F.R.D. at 428-29. Likewise, in looking at the commonality requirement, the Fifth Circuit has also held that "'the key concept in determining the propriety of class action treatment is the existence or nonexistence of material variations in the alleged misrepresentations.'" *Longden*, 123 F.R.D. at 553 (quoting *Grainger v. State Sec. Life Ins. Co.*, 547 F.2d 303, 307 (5th Cir. 1977)). *Accord In re First Republicbank Sec. Litig.*, No. 3-88-0641-H, 1989 U.S. Dist. LEXIS 11139, at *20-*22 (N.D. Tex. Aug. 1, 1989); *Greenwald*, 102 F.R.D. at 71. Here, the existence, nature, significance and uniformity of the fraudulent scheme perpetrated by defendants, as well as the material misrepresentations and omissions in their public statements during the Class Period, are issues common to all Class members.

Because the Class is bound by its common interest of determining whether defendants' conduct is actionable, based on common questions of law concerning the significance of common facts under federal law and state law, the commonality requirement is satisfied.

C. The Proposed Class Representatives' Claims Are Typical

Rule 23(a)(3) requires class representatives to present claims that are typical of the class. "The test for typicality, like the test for commonality, is not demanding." *Lightbourn*, 118 F.3d at 426. "The court focuses on the legal and remedial theories of the named plaintiffs and the class members they seek to represent." *Henry*, 199 F.R.D. at 569. "'The proper inquiry is whether other members of the class have the same or similar injury, whether the action is based on conduct not special or unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.'" *Longden*, 123 F.R.D. at 556. But the typicality "requirement ... does not mean that all claims must be identical." *Phillips v. Joint Legislative Comm. on Performance & Expenditure Review*, 637 F.2d 1014, 1024 (5th Cir. 1981). *Accord Stirman v. Exxon Corp.*, 280 F.3d 554, 562 (5th Cir. 2002); *Ligon v. Frito-Lay, Inc.*, 82 F.R.D. 42, 47 (N.D. Tex. 1979) ("'A class representative and a class member must be similarly, not identically, situated.'"). "In fact, the named representatives only need to be adequate and do not need to be the best or most typical of all possible representatives." *In re Oxford Health Plans, Inc. Sec. Litig.*, 199 F.R.D. 119, 123 (S.D.N.Y. 2001).

The proposed Class representatives' claims are typical because they arise from defendants' common scheme and course of conduct engineered to artificially impact the market price for Enron's publicly traded securities. Furthermore, this action is based upon facts that are not unique to the proposed Class representatives. The Class representatives' and Class members' claims arise from their investment in Enron securities. "'[W]here the public market of a quoted security is polluted by false information, or where price, supply and demand are distorted as a result of misleading omissions, all types of investors are injured.'" *Oxford Health*, 199 F.R.D. at 124. Therefore, the proposed Class representatives' claims are typical "because they invested in [Enron] ... just as the potential class members did." *Rubenstein*, 162 F.R.D. at 538.

D. The Proposed Class Representatives Will Adequately Protect the Interests of the Class

1. Legal Standard for Adequacy

"To satisfy the adequacy requirement of class certification, Plaintiffs must [show] that '"the representative[s] will vigorously prosecute the interests of the class through qualified counsel."'" *Dartley v. Ergobilt*, No. 3:98-CV-1442-M, 2001 U.S. Dist. LEXIS 20631, at *5 (N.D. Tex. Dec. 3, 2001). The Fifth Circuit recognizes that class-certification adequacy standards have ***not*** been changed by the PSLRA. And the Court has held that the Fifth Circuit "pronounce[d] emphatically that it has not 'created an additional independent requirement for the adequacy standard for class certification under Federal Rule of Civil Procedure 23 by reading provisions of the [PSLRA] into rule 23(a)(4)' nor 'changed the law of this circuit regarding the standard for conducting rule 23(a)(4) adequacy inquiry.'" *In re U.S. Liquids Sec. Litig.*, No. H-99-2785, Order at 4 (S.D. Tex. June 12, 2002) (quoting *Berger v. Compaq Computer Corp.*, 279 F.3d 313 (5th Cir. 2002)). Jaconette Decl., Ex. 2. Thus, in non-securities and securities actions alike, Rule 23's adequacy requirement "'encompasses class representatives, their counsel, and the relationship between the two.'" *Stirman*, 280 F.3d at 563. Here, the proposed Class representatives and Class counsel more than satisfy the Rule 23 adequacy requirements.

2. The Proposed Class Representatives

a. The Regents

The Regents suffered a $144 million loss from its purchases of Enron common stock during the Class Period. As the Court recognized when it chose The Regents to be Lead Plaintiff:

> [T]he Lead Plaintiff(s) must possess not only the largest financial interest in the outcome of the litigation, ***but must also meet the requirements of Federal Rule of Civil Procedure 23***.
>
> * * *
>
> ***Typicality and adequacy are directly relevant to the choice of the Lead Plaintiff as well as of the class representative in securities fraud class actions....*** Thus the court must examine "[1] the zeal and competence of the representative[s'] counsel and ... [2] ***the willingness and ability of the representative[s] to take an active role in and control the litigation and to protect the interests of the absentees[.]***"

In re Enron Corp., Sec. Litig., 206 F.R.D. 427, 441 (S.D. Tex. 2002) (citing *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 479, 482 (5th Cir. 2001)). Appointing The Regents Lead Plaintiff, the Court stated it was "confident that the Regents ... is capable of monitoring the lawyers here and industriously pursuing Plaintiffs' claims." *Id.* at 458. The Court further stated that The Regents "and its attorneys' zealous prosecution of this action is already evident." *Id.* at 454.

As Lead Plaintiff, The Regents, joined by Lead Counsel, has unremittingly prosecuted this action and diligently exercised its fiduciary responsibilities on behalf of the Class.

- The Regents, together with other lead-plaintiff movants, sought to freeze more than $1 billion in insider-trading proceeds[11];
- The Regents, together with other lead-plaintiff movants, were the first to seek an order preventing further destruction of documents at Andersen and sought depositions on this issue;
- Lead Counsel uncovered document destruction at Enron's headquarters, prompting monitoring by federal law-enforcement officers;
- The Regents actively monitors the litigation and Lead Counsel's prosecution strategy, reviewing all pleadings and conducting a weekly conference call with Lead Counsel;
- The Regents's in-house lawyers attend court hearings and a representative of The Regents attended each of the mediation sessions with Andersen[12];
- The Consolidated Complaint filed on behalf of the Class represents a comprehensive effort by The Regents and its counsel to maximize a recovery for the entire Class, championing all worthwhile claims and seeking compensation from all viable sources; and
- The Regents has been active in Enron's bankruptcy in New York, filing motions to obtain evidence produced by Enron and third parties, and, most recently, filing a motion to lift the bankruptcy stay to prepare this action for trial in December 2003.

Because The Regents continues to demonstrate its unyielding commitment to fair representation and recovery for all Class members, Lead Plaintiff is more than adequate to represent the Class.

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[11]The Regents brings claims based on its contemporaneous trading with defendants, on 11/2/00, 11/6/00, 11/17/00, 11/20/00, 11/22/00, 11/24/00, 11/27/00, 11/28/00, 11/29/00, 11/30/00, 12/01/00, 12/5/00, 12/7/00, 12/8/00, 12/11/00, 12/15/00, 12/18/00, 1/9/01,1/26/01, 3/1/01, 4/2/01, 4/5/01, and 7/18/01.

[12]*See, e.g.*, January 22, 2002 injunction hearing transcript concerning Andersen's destruction of documents (attended by Dorothy Dana and Lloyd Lee, senior counsel of the Office of General Counsel of The Regents); February 25, 2002 scheduling conference hearing transcript (attended by James Holst and Chris Patti, The Regents' General Counsel and University Counsel, respectively).

b. Designated Class Representatives

Lead Plaintiff "need not name a representative of the class for each subgroup of securities, where," as here, "common issues predominate as to all securities." *In re American Continental Corp./Lincoln Savings & Loan Sec. Litig. ("ACC/Lincoln")*, 794 F. Supp. 1424, 1461 (D. Ariz. 1992). Nonetheless, Lead Plaintiff has designated certain purchasers of Enron's securities to serve as additional Class representatives. Consistent with precedent in securities actions, the Court has previously certified a lead plaintiff's designated class representatives who complied with established standards under Rule 23. *See U.S. Liquids*, No. H-99-2785, Order (appointing lead plaintiff); *Collmer v. U.S. Liquids, Inc.*, No. H-99-2785, 2001 U.S. Dist. LEXIS 23518, at *8 (S.D. Tex. Jan. 23, 2001) (the Court appointed class representatives who were not named lead plaintiffs).

The proposed Class representatives bring claims under each legal theory alleged in the Consolidated Complaint and include individual investors, public and private institutional investors, a former Enron employee, and a charitable organization. They constitute a microcosm of the Class, and they share a common goal of representing the best interests of the Class, as each purchased Enron's securities and has suffered a loss resulting from defendants' fraudulent scheme.

(1) Plaintiff Purchasers of Enron's Common Stock

Robert V. Flint is an 88 year-old-retiree who worked for 42 years as an engineer at U.S. Steel in Pittsburgh. He is an active investor who reads numerous investment magazines and newspapers. Notwithstanding his 67 years of investment experience, Flint was fraudulently induced to purchase Enron equity securities – and he traded contemporaneously with defendants' sales – on 2/06/01 at $80.10, and 5/21/01 at $54.80, as detailed in his Amended Certification, and suffered damages as a result.[13] ¶81(i).

Amalgamated Bank, as Trustee for the LongView Collective Investment Fund, LongView Core Bond Index Fund and Certain Other Trust Accounts purchased over 115,000 shares of Enron stock and millions of dollars of its debt securities at artificially inflated prices during the Class Period, and has suffered damage as a result. America's oldest union-owned and operated

[13]Each proposed Class representative's certification is attached as Exs. 4-23 to the Jaconette Decl.

labor bank made its purchases of Enron stock contemporaneously with certain defendants' sales on 10/30/98, 11/06/98, 11/20/98, 2/05/99, 4/30/99, 9/03/99, 2/24/00, 4/19/00, 5/15/00, 9/01/00, 9/12/00, 9/14/00, 11/01/00, 11/22/00, 12/01/00, 12/20/00, 12/21/00, 12/22/00, 2/02/01, 3/6/01, 4/3/01, 6/11/01, 6/12/01, 6/20/01, 6/27/01, 6/28/01, 6/29/01, 7/02/01, 7/03/01, 7/05/01, and 8/02/01. Amalgamated Bank also brings claims in connection with its purchase of the 7.375% Notes due 5/15/19, and has standing to bring a claim under §§11 and 15 of the Securities Act of 1933 because it purchased pursuant to a false registration statement. ¶81(g).

Hawaii Laborers Pension Plan, a $700 million Taft-Hartley pension fund that administers the retirement savings of thousands of building tradesmen and women, purchased Enron common stock and debt securities, including debt issued and sold in connection with the sale of $500 million of medium and short-term notes. ¶81(d). It brings claims in connection with its purchase of the 7.875% Notes due 6/15/03 and has standing to bring a claim under §§11 and 15 of the Securities Act of 1933 because it purchased pursuant to a false registration statement.

George M. Placke has worked in the oil and gas business for over 20 years in Corpus Christi. He first invested in Enron in 97, and during the Class Period on 1/14/99 (600 shares at $32), 9/28/00 (150 shares at $87.875) – contemporaneously with certain defendants' sales – and on 9/29/00 (500 shares at $89.625), and was damaged as a result. ¶81(k).

Michael J. Bessire has worked for over 30 years in the grocery business and lives in Lubbock, Texas, on leave from his executive position at Safeway. He tracks his stocks by computer and reads business-related articles and newspapers. Bessire purchased 125 shares of Enron common stock on 5/2/00 at $74 – contemporaneously with certain defendants' sales – and was damaged thereby. ¶81(k).

Dr. Richard Kimmerling, a practicing surgeon in an Atlanta suburb, retired as a Colonel in the Air Force Reserves. He purchased Enron stock on 8/28/00 (45 shares at $86.87) – contemporaneously with certain defendants' sales – and on 9/18/00 (115 shares at $89.437). ¶81(k). The first trade was done on E-trade, the second via USAA Investment Management Co.

Michael B. Henning is an Indiana insurance executive who retired in Florida. He purchased Enron stock on 8/31/00 (200 shares at $85.5625), 3/23/01 (100 shares at $58.08), 5/10/01 (100 shares at $58.38), and 5/18/01 (100 shares at $54.20) – all four of which he traded contemporaneously with certain defendants' sales – and 8/15/01 (200 shares at $37.11). ¶81(k). He sold all of his shares on 12/12/01 for $0.56 per share: total investment was more than $40,000, sale proceeds were $365 after Enron's collapse. Henning is an active investor who reads business magazines, follows his portfolio online, and he invested in Enron through an IRA contributory account at Charles Schwab.

John Zegarski is a former Company broadband construction employee – 3/00 to 11/00 – who purchased Enron equity securities in his 401(k) account at $84.50 per share on 8/15/00, and his ability to fund his retirement plan has been substantially impaired as a result. ¶81(j).

Joseph C. Speck worked for 35 years as a CPA in Peoria, Illinois, and is now retired in Florida. He is an active investor who watches business news programs, reads business articles, and scrutinizes financial statements. He purchased Enron's stock – contemporaneously with certain defendants' sales – on 8/29/00 (100 shares at $87.375), and on 4/12/01 (50 shares at $57.50), and has been damaged as a result. ¶81(k).

Ben L. Schuette worked for 40 years as an electrical contractor in Corpus Christi, Texas and is now retired. He actively investigated and followed his Enron investment through press releases and analyst reports. Schuette purchased Enron common stock – contemporaneously with certain defendants' sales – on 1/25/00 (1,000 shares at $63.937), and on 7/21/01 (1,000 shares at $70), through an account at DLJ Direct/CSFB Direct, and was damaged as a result. ¶81(k).

San Francisco City and County Employees' Retirement System, which provides benefits for thousands of active and retired city and county employees, traded contemporaneously with certain defendants' sales on 10/29/98, 11/12/98, 12/30/98, 1/6/99, 2/4/99, 4/1/99, 4/16/99, 4/28/99, 11/12/99, 3/20/00, 5/1/00, 8/24/00, 9/5/00, 11/2/00, 11/3/00, 11/6/00, 11/24/00, 12/4/00, 12/13/00, 12/15/00, 12/20/00, 1/02/01, 1/3/01, 2/23/01, 2/26/01, 3/14/01, 4/3/01, 4/10/01, 4/11/01, 5/2/01,7/9/01, 7/19/01, 7/23/01, and 8/2/01, and was damaged as a result. ¶81(b).

John J. and Charlotte E. Cassidy, as Trustees for the John & Charlotte Cassidy Family Trust, both worked at Pacific Telephone for over 30 years. Retired in San Diego, they purchased Enron common stock via the Enron Direct Service Program and the Dividend Reinvestment

Program, including a purchase on 7/21/99 (58.737 shares at $85.125 per share), when they traded contemporaneously with certain defendants' sales. ¶81(k). The Cassidys are informed investors, who regularly watch and read business programs and articles.

(2) Plaintiff Purchasers of Enron's Debt

Washington State Investment Board, responsible for the management and investment of public and retirement funds, purchased Enron publicly traded debt securities. ¶81(a). The Washington Board brings "opt-in" claims under the Texas Securities Act for its purchases of Enron's 6.40% Notes due 7/15/06, and 6.95% Notes due 7/15/28. ¶¶1017-1030. It also brings claims for violations of federal securities law in connection with its purchases of the 6.750% Notes due 8/01/09, and the 7.375% Notes due 5/15/19, and has standing to bring a claim under §§11 and 15 of the Securities Act of 1933 because it made its purchase of the latter 7.375% Notes pursuant to a false registration statement.

Employer-Teamsters Local Nos. 175 & 505 Pension Trust Fund, a Taft-Hartley pension fund that oversees the retirement savings of thousands of Teamsters and has approximately $225 million in assets, brings claims in connection with its purchase of the 7.375% Notes due 5/15/19, and has standing to bring a claim under §§11 and 15 of the Securities Act of 1933 because it made its purchase pursuant to a false registration statement. ¶81(c).

Archdiocese of Milwaukee Supporting Fund, Inc., a charitable, non-profit organization that has donated over $40 million to other charitable programs over the past decade, brings claims in connection with its purchase of the 7.875% Notes due 6/15/03, and has standing to bring a claim under §§11 and 15 of the Securities Act of 1933 because it made its purchase pursuant to a false registration statement. ¶81(o).

Nathaniel Pulsifer, trustee of the Shooters Hill Revocable Trust, an institutional investor who, on behalf of its client Shooters Hill Revocable Trust, brings claims in connection with his purchase of the 7.0% Exchangeable Notes due 7/31/02, and has standing to bring a claim under §§11 and 15 of the Securities Act of 1933 because he purchased pursuant to a false registration statement.

Staro Asset Management, L.L.C. purchased the Zero Coupon Convertible Senior Notes due 2021, and has standing to bring a claim under §§11 and 15 of the Securities Act of 1933 because it purchased pursuant to a false registration statement. ¶81(e).

(3) Plaintiff Purchasers of Enron's Preferred Stock

Mervin "Buddy" Schwartz, Jr. worked for 38 years maintaining Hershey Candy Company production lines and is now retired. He purchased 1,420 shares of Enron Capital Trust 8.3% Preferred Securities on 12/8/99, through his broker at Merrill Lynch. ¶81(l).

Stephen M. Smith purchased shares of Enron Capital 8% Preferred stock on 10/29/01 (500 shares at $17.04), 10/29/01 (500 shares at $16.90), and on 11/08/01 (1000 shares at $17.75), as well as Enron common stock on 8/15/01 (100 shares at $36.93), 10/23/01 (200 shares at $21), and 11/07/01 (200 shares at $8). ¶81(n).

3. The Proposed Class Representatives Will Vigorously Prosecute the Interests of the Class Through Qualified Counsel

The proposed Class representatives have personally demonstrated they are familiar with the facts and allegations of the case, understand the nature of their claims and their responsibilities as a Class representative, and will zealously represent the Class. They are well informed about the ongoing status of the litigation and prepared to continue their active role in the case. The proposed Class representatives are represented by Lead Counsel Milberg Weiss, which has been appointed class counsel in hundreds of securities class actions, as well as additional counsel who are qualified and experienced in securities class actions. The resumé of Lead Counsel, previously submitted to the Court in conjunction with the Motion for Lead Plaintiff, establishes its qualifications and evidences its ability to vigorously prosecute this action with the proposed Class representatives. Moreover, the Court has twice recognized Milberg Weiss to be "qualified and experienced in securities class action suits, and more than competent to represent a class." *U.S. Liquids*, No. H-99-2785, Order at 5; *Enron*, 206 F.R.D. at 458. Liaison counsel, Schwartz, Junell, Campbell & Oathout LLP, is also qualified and experienced in the prosecution of securities class actions. *U.S. Liquids*, No. H-99-2785, Order at 5.

The interests of the proposed Class representatives, moreover, coincide with the interests of the Class. They both have a significant interest in seeing that each defendant is found liable for the fraudulent scheme alleged in the Consolidated Complaint. The proposed Class representatives' claims are typical of claims of other Class members, and issues of fact and law raised in the Consolidated Complaint are common to all Class members. "'[S]o long as all class members are united in asserting a common right, such as achieving the maximum possible recovery for the class, the class interests are not antagonistic for representation purposes.'" *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 208 (5th Cir. 1981). Consequently, there are no conflicts between the Class and the proposed Class representatives, who will, with Class Counsel, zealously represent the interests of all Class members.

Moreover, the proposed Class representatives have signed a certificate attesting to their agreement to serve as representatives if appointed, and to provide testimony if necessary. *See* Jaconette Decl., Exs. 4-23. As further provided in their certifications, none of the proposed class representatives purchased Enron's securities at the direction of counsel. And they have certified that they will not accept any payment for serving as a representative beyond their pro rata share of any recovery, except such reasonable costs and expenses directly relating to their representation as ordered or approved by the Court.

In sum, each proposed Class representative is committed to prosecuting this action expeditiously, has met with or discussed the case with Lead Counsel, presents typical claims based on defendants' scheme, and will adequately represent the interests of the Class.

E. This Action Satisfies Rule 23(b)(3)

Plaintiffs seek certification under Rule 23(b)(3), which states that an action may be maintained as a class action if

> the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the

particular forum; (D) the difficulties likely to be encountered in the management of a class action.

The issues to consider under Rule 23(b)(3) are predominance and superiority. *See Henry*, 199 F.R.D. at 570. These requirements also are satisfied.

1. Common Questions of Law or Fact Predominate

Predominance, in the context of Rule 23, means that those issues or defenses claimed on behalf of the Class ought to be superior to, and unencumbered by, any individual claims or issues that may affect the lawsuit. Rule 23 does not require each issue in the case to be similar to all Class members, only that common questions predominate over individual issues. *Longden*, 123 F.R.D. at 556.

Because the commonality and typicality requirements are met, common issues predominate in this action. All of the asserted claims arise from the same fraudulent scheme that affected all proposed Class members. That is, because the Class was subjected to the same alleged misrepresentations and omissions, which fit within a common course of conduct, common questions predominate and a class action is appropriate. *Durrett v. John Deeree Co.*, 150 F.R.D. 555, 560 (N.D. Tex. 1993). And no individual issues of reliance destroy predominance. ***First***, there is no reliance element in plaintiffs' Texas Securities Act or Securities Act of 1933 claims.[14] ***Second***, with respect to their claims under the Securities Exchange Act of 1934, plaintiffs avail themselves of the fraud-on-the-market presumption.[15] Enron's securities all traded in an efficient market, as publicly available information about the Company was quickly incorporated into the price for its securities. Further, its common stock, preferred stock, and certain debt securities were all traded on (among other exchanges) the New York Stock Exchange. By proxy, the prices of Enron's securities not traded on that exchange closely approximated movements in the Company's NYSE benchmark

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[14]*Weatherly v. Deloitte & Touche*, 905 S.W.2d 642, 649 (Tex. App.–Houston [14th Dist.] 1995, *writ dism'd w.o.j.*) ("Article 581-33 of the Texas Securities Act does not require the buyer to prove reliance on the seller's misrepresentation or omission."); *Wood v. Combustion Engineering, Inc.*, 643 F.2d 339, 345 (5th Cir. 1981) ("There is no requirement of reliance under the [Texas] Blue Sky law."); *Barnes v. Osofsky*, 373 F.2d 269, 272 (2d Cir. 1967) (§11 provides a "conclusive presumption of reliance upon the registration statement").

[15]*See Basic Inc. v. Levinson*, 485 U.S. 224 (1988).

securities. Furthermore, "any administrative difficulties in handling this class action are preferable to duplicating judicial resources in several individual lawsuits and denying access to the courts for class members." *First Republicbank*, 1989 U.S. Dist. LEXIS 11139, at *50.

2. The Class Action Is Superior to Other Available Methods for the Fair and Efficient Adjudication of This Action

The class-action device is a superior method for resolving plaintiffs' claims because it provides the fairest and most efficient adjudication. Simply stated, securities class actions are both cost effective and manageable. "The availability of the class action to redress such frauds has been consistently upheld ...." *Blackie*, 524 F.2d at 903; *see also Durrett,* 150 F.R.D. at 560.[16]

Class certification here is useful and necessary. Courts in the Fifth Circuit recognize the efficacy of the class-action device for redressing injury to large groups of individuals harmed by a common set of operative facts. "It is desirable that securities fraud cases involving a large number of plaintiffs with small individual claims proceed as class actions ...." *Keasler v. Natural Gas Pipeline Co.*, 84 F.R.D. 364, 368 (E.D. Tex. 1979); *Longden*, 123 F.R.D. at 551. Class representation is the only way to afford relief to those plaintiffs whose claims are too small to permit them to bring individual suits. *Henry*, 199 F.R.D. at 573. That thousands of plaintiffs lost a considerable amount of money in connection with the scheme alleged is perfectly consistent with the fact that many more Class members sustained losses not substantial enough to justify independently prosecuting their claims. Thus, to deny class certification would be to "clos[e] the door of justice to all small claimants." *Weeks v. Bareco Oil Co.*, 125 F.2d 84, 90 (7th Cir. 1941).

Moreover, the class-action device offers judicial efficiency because it permits common claims and issues to be tried once, with binding effect on all parties. The number of prospective Class members here is far too numerous, and the underlying factual and legal issues far too similar, to rationally argue that plaintiffs' claims ought to be heard independently of one another. Indeed, "[t]he recognized purpose of the class action is to provide a mode of relief to those who have been

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[16]*See also King v. Kansas City S. Indus., Inc.*, 519 F.2d 20, 25-26 (7th Cir. 1975); *In re THQ, Inc., Sec. Litig.*, No. CV-00-1783 AHM(Ex), 2002 U.S. Dist. LEXIS 7753, at *8 (C.D. Cal. Mar. 22, 2002); *In re Texas Int'l Sec. Litig.*, 114 F.R.D. 33, 39-40 (W.D. Okla. 1987); *Adams v. Reagan*, 791 S.W.2d 284, 292 (Tex. App.–Fort Worth 1990) ("a class action is a particularly well-suited method of adjudicating a securities fraud action" under the Texas Securities Act).

injured by a fraudulent scheme such as that alleged here." *Weinberger v. Thornton*, 114 F.R.D. 599, 605 (S.D. Cal. 1986).

The proposed Class representatives foresee no significant management difficulties precluding this case from being maintained as a class action and they are confident that any potential management problems can be addressed by the parties and resolved by the Court. Possible management problems are not, standing alone, grounds for denying plaintiffs' motion. *In re Sugar Indus. Antitrust Litig.*, 1977-1 Trade Cas. (CCH) ¶61,373, at 71,340 (N.D. Cal. 1976). Indeed, the Fifth Circuit has noted that even where manageability issues are present, the Court should weigh those concerns against the benefits of proceeding as a class: "Regarding the manageability of the class action, there is a possibility that some damages calculations would be burdensome. But ***the economies of class treatment of the numerous common issues weigh in favor of class treatment.***" *Bertulli*, 242 F.3d at 299; *see also First Republicbank*, 1989 U.S. Dist. LEXIS 11139, at *49-*50. In considering the superiority of proceeding as a class, consideration is given to several factors, including manageability and "the policy underlying Rule 23 to 'achieve economies of time, effort and expense, and promote uniformity of decisions as to persons similarly situated.'" *Henry*, 199 F.R.D. at 570. These considerations are present here and the proposed Class satisfies the requirements of Rule 23(b)(3).

F. Unsupported Allegations of Conflicts Cannot Rebut Lead Plaintiff's Demonstration of Adequacy, Predominance, or Superiority

Opponents invariably argue that class certification is inappropriate because purported conflicts of interest render certification inviolate of Rule 23. But "there is no requirement [under Rule 23 or due process] that the claims of all plaintiffs and class members must be identical." *Enron*, 206 F.R.D. at 445. In response to unsupported allegations that an Enron common-stock purchaser could not adequately represent the interests of its bond holders, the Court held that at both the lead-plaintiff and class-certification stages: "Different interests need not necessarily constitute fatal conflicts." *Id.* at 448 n.18. That is, "courts have repeatedly concluded that stock purchasers can represent purchasers of debt instruments and vice versa in the same action." *Id.* at 445. And "courts have generally declined to consider conflicts, particularly as they regard damages, sufficient to defeat class action status at the outset unless the conflict is apparent, imminent, and on an issue at the very heart of the suit." *Blackie*, 524 F.2d at 909.

Moreover, "plaintiffs need not name a representative of the class for each subgroup of securities, where common issues predominate as to all securities." *ACC/Lincoln Savings*, 794 F. Supp. at 1461. Nonetheless, Lead Plaintiff has designated Class representatives who purchased various types of Enron securities, including common and preferred stock, and a wide selection of its debt securities. *See supra* §III.D.2.b.

Class certification has proven both proper and successful in litigating the claims of a single class of investors who purchased different types of securities and were damaged by a massive fraudulent scheme, which allegedly violated state and federal securities laws and was perpetrated by a large group of diverse defendants that included accountants, bankers, and lawyers. For example, in *ACC/Lincoln*, plaintiffs raised common legal and factual issues and the court certified a single class of investors who purchased five different securities of American Continental Corporation (stocks, bonds, and debentures). The court certified a class period of more than three years, for an action that sought relief, among others, under §§10(b) and 18 of the Securities Exchange Act of 1934, §§11 and 12 of the Securities Act of 1933, the Racketeer Influenced and Corrupt Organizations Act, common-law fraud, negligent misrepresentation, breach of fiduciary duty, and California Corporations Code §§1507 and 2540, the last of which are similar to the Texas Securities Act. ACC/*Lincoln*, 794 F. Supp. at 1432, 1436. Defendants in *ACC/Lincoln* included Andersen and two other accounting firms, two law firms, the trustee of an employee stock- ownership plan, a bank, American Continental Corporation, and its former chairman, Charles H. Keating, Jr. *Id.* at 1432-33.

After the *ACC/Lincoln* class was certified, the court denied a decertification motion by certain defendants. In an opinion that quotes extensively from a Fifth Circuit opinion dealing with allegations of a fraudulent scheme, the court stated:

> [T]he gravamen of the alleged fraud is not limited to the specific misrepresentations made to [investors]. ***The allegation is of a whole roster of deception designed to contrive a false image of ACC/Lincoln***. Defendants allegedly represented the integrity of their operations to Plaintiffs through Lincoln offices, using regulatory documents such as prospectuses and registration statements, brochures, and pictures of impressive holdings. ***Sham accounting allegedly enabled Defendants to mask ACC/Lincoln's weaknesses, while substantially skewing its worth.***

> Misrepresentations to regulators allegedly effected and perpetuated ACC's very license to own and operate Lincoln Savings.... ***It is the underlying scheme which demands attention [and is therefore the predominant issue]. Each plaintiff is similarly situated with respect to it, and it would be folly to force each [investor] to prove the nucleus of the alleged fraud again and again.***[17]

As in *Blackie*, the *ACC/Lincoln* defendants challenged class certification on the grounds that conflicts between the representatives and class members, and between the different investors making up the class, were insurmountable, but the court disagreed:

> [Defendants] assert that the interests of the representatives conflict with those of the class members. Defendants' challenges are all variations on the following theme: since each representative stands in a particular position vis-a-vis the defendants, the interests of the class members who stand in different positions will not be adequately represented. Defendants make this argument with regard to the type of security at issue, the time at which the security was purchased, whether the investor resold the securities during the class period, and the alleged existence of specific defenses applicable to particular representatives. While these assertions are not devoid of merit, the court does not believe that they constitute conflicts between the representatives and the members of the potential class which would deprive the members of adequate representation and thus preclude certification.
>
> ***The fact that five different types of securities are at issue does not present a conflict where, as alleged here, all were sold pursuant to the same or similar misrepresentations. In addition, each type of security was purchased by at least one of the named representatives.***

Shields v. Keating, No. CV 89-2052 SVW (Bx), Order at 5-6 (C.D. Cal. Dec. 27, 1989). Jaconette Decl., Ex. 3. Accordingly, notwithstanding the complexity of this case, unsupported allegations of conflict should not defeat class certification.

IV. CONCLUSION

Because the proposed Class meets the requirements of Rule 23, and the proposed Class representatives meet the Court's adequacy requirements, Lead Plaintiff respectfully requests that the Court appoint Class representatives Robert V. Flint, Amalgamated Bank, Hawaii Laborers Pension Plan, George M. Placke, Michael J. Bessire, Dr. Richard Kimmerling, Michael B. Henning, John Zegarski, Joseph C. Speck, Ben L. Schuette, San Francisco City and County Employees' Retirement System, John J. and Charlotte E. Cassidy, Washington State Investment Board, Employer-Teamsters Local Nos. 175 & 505 Pension Trust Fund, Archdiocese of Milwaukee Supporting, Fund, Inc., Nathaniel Pulsifer, Staro Asset Management, L.L.C., Mervin Schwartz, Jr., and Stephen M. Smith,

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[17] *ACC/Lincoln*, 140 F.R.D. at 431 (citing *Shores v. Sklar*, 647 F.2d 462 (5th Cir. 1981)).

and certify a Class of (i) all persons who purchased Enron's publicly traded equity and debt securities between October 19, 1998, and November 27, 2001, and (ii) all states or political subdivisions thereof or state pension plans that purchased from defendants Enron's 6.4% Notes due 7/15/06 or 6.95% Notes due 7/15/28, and that authorize the prosecution of their claim pursuant to the Texas Securities Act in this action.

DATED: October 1, 2002

Respectfully submitted,

MILBERG WEISS BERSHAD
HYNES & LERACH LLP
WILLIAM S. LERACH
DARREN J. ROBBINS
HELEN J. HODGES
BYRON S. GEORGIOU
G. PAUL HOWES
JAMES I. JACONETTE
MICHELLE M. CICCARELLI
JAMES R. HAIL
JOHN A. LOWTHER
ALEXANDRA S. BERNAY
MATTHEW P. SIBEN
ROBERT R. HENSSLER, JR.

William S. Lerach by permission
WILLIAM S. LERACH

401 B Street, Suite 1700
San Diego, CA 92101
Telephone: 619/231-1058

MILBERG WEISS BERSHAD
HYNES & LERACH LLP
STEVEN G. SCHULMAN
SAMUEL H. RUDMAN
One Pennsylvania Plaza
New York, NY 10119-1065
Telephone: 212/594-5300

Lead Counsel for Plaintiffs

SCHWARTZ, JUNELL, CAMPBELL
& OATHOUT, LLP

Roger B. Greenberg /s/

ROGER B. GREENBERG
State Bar No. 08390000
Federal I.D. No. 3932
Two Houston Center
909 Fannin, Suite 2000
Houston, TX 77010
Telephone: 713/752-0017

HOEFFNER & BILEK, LLP
THOMAS E. BILEK
Federal Bar No. 9338
State Bar No. 02313525
Lyric Office Centre
440 Louisiana Street, Suite 720
Houston, TX 77002
Telephone: 713/227-7720

Attorneys in Charge

BERGER & MONTAGUE, P.C.
SHERRIE R. SAVETT
1622 Locust Street
Philadelphia, PA 19103
Telephone: 215/875-3000

Attorneys for Staro Asset Management

WOLF POPPER LLP
ROBERT C. FINKEL
845 Third Avenue
New York, NY 10022
Telephone: 212/759-4600

SHAPIRO HABER & URMY LLP
THOMAS G. SHAPIRO
75 State Street
Boston, MA 02109
Telephone: 617/439-3939

Attorneys for van de Velde

SCOTT & SCOTT, LLC
DAVID R. SCOTT
JAMES E. MILLER
108 Norwich Avenue
Colchester, CT 06415
Telephone: 860/537-3818

Attorneys for the Archdiocese of Milwaukee Supporting Fund, Inc.

THE CUNEO LAW GROUP, P.C.
JONATHAN W. CUNEO
MICHAEL G. LENETT
317 Massachusetts Avenue, N.E., Suite 300
Washington, D.C. 20002
Telephone: 202/789-3960

Washington Counsel

DECLARATION OF SERVICE BY WEBSITE AND UPS

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of San Diego, over the age of 18 years, and not a party to or interest in the within action; that declarant's business address is 401 B Street, Suite 1700, San Diego, California 92101.

2. That on October 1, 2002, declarant served the LEAD PLAINTIFF'S MOTION FOR CLASS CERTIFICATION by posting to the website or UPS overnight to the parties as indicated on the attached Service List, pursuant to the Court's August 7, 2002 Order Regarding Service of Papers and Notice of Hearings.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 1st day of October, 2002, at San Diego, California.

Mo Maloney

Mo Maloney

The Service List

May be Viewed in

the Office of the Clerk